IN THE

Supreme Court of the United States

OCTOBER TERM—1952

No. ~~230~~ 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF OF PETITIONER

The Solicitor General urges that our petition should be denied with respect to questions designated as 1, 2 and 4 at page 7 of our petition. We consider it necessary to reply only with respect to the Solicitor General's argument concerning question 1.

In answering our contention that failure to join the employer was fatal to the proceeding, respondent now asserts for the first time (pp. 15-18), that since Fowler filed a charge against the Union alone and did not file a charge against the Company, that the Board was without power to join the Company as a party.

This argument represents a complete reversal in the position heretofore taken by the Board as expressed in its brief to the Court below, where the Board argued

that: "Whether the Board seeks a remedy against both the Union and the employer or proceeds against one or the other is left to the discretion of the Board". Thus, whereas the Board has heretofore maintained that it had discretion to determine the party or parties against which it would proceed, it now maintains that its failure to join the employer was dictated and controlled by the circumscribed charge filed with it.

The only case cited in apparent support of its present contention that the Board is limited in its right to proceed to remedy an unfair labor practice solely to the person against whom a charge is filed is *Consumers Power Company* v. *N. L. R. B.*, 113 Fed. (2) 38, 42-43 (C. A. 6). We fail to find in this case, decided under the Wagner Act, any support for such contention. The restricted interpretation of its powers now advanced by the Board in reliance upon Section 10 (b) of the Act, would seem to overlook other countervailing provisions of the Act (cf. Section 10 (a)). Its present position also departs from the long recognized view that "the role of the charge is merely to set in motion the machinery of an inquiry." Cf. *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. (2) 1008 (C. A. 7). The acceptance of the Board's present position would have the effect of rendering nugatory the clear, pervading injunction of the Act that any and every action of the Board shall be designed to "effectuate the policies of the Act".

Assuming, however, that the powers of the Board are as limited as the Board now contends, it cannot be gainsaid that, as a practical matter, the Board could have refused to proceed unless the charging party leveled his charge against the employer as well as the Union. Only so could it enforce the *public* right involved and abide by the injunction contained in the Act that its conduct must be designed to effectuate the policies of the Act. *National Licorce Co.* v. *Labor Board,* 309 U. S. 350. To permit a

charging party to apprise the Board of facts which add up to an unfair labor practice simultaneously committed by two parties, and to permit such charging party to dictate to the Board that only one of these two shall be made to answer therefor—and this, in the face of clear Board policy as enunciated in *H. M. Newman,* 85 N. L. R. B. 725, results in a situation which is repugnant to the entire spirit of the Act and which transforms the Board into an instrumentality for the vindication of private rather than public rights. *Amalgamated Workers* v. *Edison Co.,* 309 U. S. 261. As this Court said in *N. L. R. B.* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9:

> "It is not required by the statute to move on every charge. * * * It may decline to be imposed upon or to submit its process to abuse."

The Solicitor General further argues (p. 16) that we have pointed to nothing in the statute and to no judicial authority in direct support of our position on this question. This is so because never before has the propriety of the conduct here engaged in by the Board been directly exposed to judicial scrutiny. To the extent that the point here raised was touched upon in *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union,* 192 F. (2) 654, and in *Union Starch & Refining Company* v. *N. L. R. B., supra,* the comments of the Court were mere dicta.

As to our companion contention that the backpay order is invalid without an order of reinstatement, the Solicitor General has cited cases (p. 18, note 13) which are certainly not determinative of the question here raised.

The Wagner Act contained no proviso comparable to that now set forth in unmistakable language in Section 10 (c) of the Act. The language there set forth is clear and unequivocal, *viz.*: "*Provided,* That where an order directs reinstatement of an employee backpay may be required of the employer or labor organization, as the case

may be, responsible for the discrimination suffered by him." The Board's contention on this point can be accepted only at the price of repealing the phrase *"where an order directs reinstatement"* The purposefulness of Congress's intent, in inserting that phrase, with full knowledge of the decisions rendered under the Wagner Act, is emphasized by the fact that it is contained in a proviso which follows the preceding general language of Section 10 (c). It is beyond the power of the Board to repeal that phrase.

In *Progressive Mine Workers* v. *N. L. R. B.*, 187 Fed. (2) 298 (C. A. 7), 27 L. R. R. M. 2334, the Court correctly pointed out that:

> "Sec. 10 (c) contains the Board's *sole authority* for directing backpay". (Emphasis supplied.)

Respectfully submitted,

ABNER H. SILVERMAN,
EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, New York,

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.,

Counsel for Petitioners.

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